Supreme Court, U.S.
FILED

(1)

No. 981622 APR 8 - 1999

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

TERRY MORGAN

Petitioner,

vs.

THE COUNTY OF LAKE, AND THE SUPERIOR COURT IN AND FOR THE COUNTY OF LAKE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LAW OFFICE OF HENRY F. TELFEIAN
HENRY F. TELFEIAN
Counsel of Record
1247 Alvarado Road
Berkeley, CA 94705-1545
Tel: (510) 848-0542

Counsel For Petitioner
Terry Morgan

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

34pp

QUESTIONS PRESENTED

1. Does the Ninth Circuit's Rule designating certain decisions as "non-citable" and "non-precedential" violate the due process and/or equal protection clauses of the United States Constitution?

2. Does the Ninth Circuit apply its non-publication/non-citation Rule in an arbitrary and capricious manner such that the Rule, as applied, violates the due process and/or equal protection clauses of the United States Constitution?[1]

---

[1] All parties to the Ninth Circuit proceedings are listed in the caption. There are no corporate parties.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

I. CITATION TO OPINIONS BELOW 1

II. JURISDICTION 1

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

IV. STATEMENT OF THE CASE 4

V. REASONS FOR GRANTING THE WRIT 8

A. UNPUBLISHED, AND OFTENTIMES UNCITABLE, APPELLATE DECISIONS ARE NOW THE NORM, RATHER THAN THE EXCEPTION 8

B. SELECTIVE PUBLICATION HAS CREATED AN UNAUTHORIZED AND UNAPPROVED BODY OF SECRET LAW 11

C. THE NINTH CIRCUIT VIOLATES THE CONSTITUTION IN CREATING, BY LOCAL RULE, A BODY OF SECRET, NONCITABLE LAW 12

D. THE NINTH CIRCUIT'S RULE ESTABLISHING CRITERIA FOR THE PUBLICATION OF DECISIONS PROVIDES NO EFFECTIVE OR MEANINGFUL RESTRAINT ON THE CIRCUIT'S DISCRETION, AND THEREFORE LEADS TO ARBITRARY AND CAPRICIOUS IMPLEMENTATION 17

VI. CONCLUSION 21

TABLE OF CONTENTS – Continued

Page

APPENDIX A .....App. 1

APPENDIX B.....App. 4

APPENDIX C.....App. 6

TABLE OF AUTHORITIES

Page

CASES

Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034 (1982) 19

County of Los Angeles v. Kling, 474 U.S. 936, 106 S. Ct. 300 (1985)..... 11

Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459 (1944)..... 14

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 114 S. Ct. 425 (1993)..... 16

Johnson v. Knable, 1988 WL 119136 (4th Cir. 1988) 19

Jones v. Superintendent, Virginia State Farm, 465 F.2d 1091 (4th Cir. 1972)..... 13

National Classification Committee v. United States, 765 F.2d 164 (D.C. Cir. 1985)..... 20

Re Rules of the United States Court Of Appeals For the Tenth Circuit, 955 F.2d 36 (10th Cir. 1992)..... 13

S.G. Borello & Sons v. Dept. of Industrial Relations, 48 Cal. 3d 341 (1988)..... 7

Tieberg v. Unemployment Insurance Appeals Board, 2 Cal. 3d 943 (1970)..... 6

Toyota Motor Sales U.S.A., Inc. v. Superior Court, 220 Cal. App. 3d 864 (1990) 7

U.S. v. Edge Broadcasting Co., 509 U.S. 418, 113 S. Ct. 2696 (1993)..... 19

TABLE OF AUTHORITIES – Continued

Page

U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 115 S.Ct. 386 (1994)..... 11, 15, 16

Vizcaino v. Microsoft Corporation, 120 F.3d 1007 (9th Cir. 1997), *cert. den.*, 118 S. Ct. 899 (1997)..... 18

STATUTES AND RULES

1st Circuit Local Rule 36.1..... 10

2nd Circuit Local Rule .23..... 10

3rd Circuit Local Rule IOP 5.1-5.8 11

4th Circuit Local Rule 36(c)..... 11

5th Circuit Local Rule 47.5..... 11

6th Circuit Local Rule 24 11

6th Circuit Local Rule 24(c)..... 13

7th Circuit Local Rule 53 10

7th Circuit Local Rule 53(c)(1)(v)..... 19

8th Circuit Local Rule 28A..... 11

9th Circuit Local Rule 36-1 .....2, 12

9th Circuit Local Rule 36-2 ..... 2, 8, 18

9th Circuit Local Rule 36-3 .....3, 6, 7, 12

9th Circuit Local Rule 36-4 3

10th Circuit Local Rule 36.3.....11, 14

11th Circuit Local Rule 36-2 11

28 U.S.C. § 1257(a) 1

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1367(a) 5

28 U.S.C. § 2071 1

42 U.S.C. § 2000e 5

Calif. Government Code § 995 5

Calif. Labor Code § 2802 5

Fed. R. App. Proc., Rule 47 1

Fed. R. Civ. Proc., Rule 13(a) 5

Fed. R. Civ. Proc., Rule 13(g) 5

U.S. Constitution, Fifth Amendment 4

U.S. Constitution, Fourteenth Amendment, § 1 4

MISCELLANEOUS

Carrington, et al., *Justice on Appeal* (1976) 12

Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735 (1949) 14

Dragich, *Once A Century: Time For A Structural Overhaul Of The Federal Courts*, 1996 Wis. L. Rev. 11 21

Dragich, *Will The Federal Courts Of Appeal Perish If They Publish? Or Does The Declining Use Of Opinions To Explain And Justify Judicial Decisions Pose A Greater Threat*, 44 Am. U. L. Rev. 757 (1995) 9, 14, 18

Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224 (1975) 12

TABLE OF AUTHORITIES – Continued

Page

Judicial Business of the U.S. Courts, *Annual Report of the Director, 1998* 10

Reynolds & Reichman, *An Evaluation of Limited Publication in the United States Court of Appeals: The Price of Reform*, 48 Chi. L. Rev. 573 (1981)..... 18

Richman & Reynolds, *Elitism, Expediency, And The New Certiorari: Requiem For The Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996).....12, 20

Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Court of Appeals*, 87 Mich. L. Rev. 940 (1989) 18

Slavitt, *Selling The Integrity Of The System Of Precedent: Selective Publication, Depublication, And Vacatur*, 30 Harv. C.R.-C.L. Rev. 109 (1995) 16

I.

CITATION TO OPINIONS BELOW

The Memorandum decision of the Ninth Circuit Court of Appeals is printed in Appendix "A", *infra*, and is not officially reported. (App. 1-3.) The Ninth Circuit's Order denying Appellant Morgan's Petition for Rehearing and Suggestion for Rehearing En Banc appears in Appendix "B", *infra*. (App. 4-5.) The Ninth Circuit's rejection of Morgan's publication request is set forth in a letter from Cathy A. Catterson, Clerk of Court, dated February 10, 1999, and appears in Appendix "C", *infra*. (App. 6.)

II.

JURISDICTION

The Ninth Circuit's decision was issued on December 4, 1998. (App. 1.) Morgan's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 13, 1999. (App. 4.) This petition for certiorari was filed within ninety days of that date and invokes this Court's Jurisdiction under 28 U.S.C. § 1257(a).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The only federal statute implicated is 28 U.S.C. § 2071 which authorizes the courts of appeal to adopt local rules of practice. Pursuant to § 2071 and Rule 47 of the Federal Rules of Appellate Procedure, the Ninth Circuit has adopted Circuit Rule 36 which provides, *inter alia*, as follows:

Circuit Rule 36-1: Opinions, Memoranda, Orders; Publication

Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam."

All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited.

Circuit Rule 36-2: Criteria For Publication

A written, reasoned disposition shall be designated as an OPINION only if it:

(a) Establishes, alters, modifies or clarifies a rule of law, or

(b) Calls attention to a rule of law which appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

Circuit Rule 36-3: Other Dispositions

Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

Circuit Rule 36-4: Request For Publication

Publication of any unpublished disposition may be requested by letter addressed to the Clerk, stating concisely the reasons for publication. Such a request will not be entertained unless received within 60 days of issuance of this Court's disposition. . . . If such a request is granted, the unpublished disposition will be redesignated an opinion.

* * *

The Constitutional provisions implicated are the due process clauses contained in Fifth and Fourteenth Amendments and the equal protection clause, also contained in the Fourteenth Amendment.

The Fifth Amendment provides *inter alia:*

"No person shall be . . . deprived of life, liberty, or property without due process of law. . . . "

Section 1 of the Fourteenth Amendment provides *inter alia:*

> " . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

IV.

STATEMENT OF THE CASE[2]

Petitioner Terry Morgan ("Morgan") worked as a *pro tem* court reporter for the Lake County Superior Court in 1993 under the supervision of Lee Poole ("Poole"), the Chief Court Reporter. On August 23, 1994, Morgan filed a complaint in the U.S. District Court for the Northern District of California naming the County of Lake ("County"), the Superior Court for the County of Lake ("Superior Court"), and Poole as defendants. Morgan's

---

[2] This statement is based on the undisputed procedural record.

Complaint set forth ten causes of action alleging claims of sexual harassment, retaliation, and various state torts and invoked the District Court's jurisdiction under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*).

While Morgan's Complaint was pending, Poole and his wife filed a state complaint naming Morgan as a defendant, among others. The "Poole Complaint" was removed to the District Court as a compulsory counter-claim under Rule 13(a) of the Federal Rules of Civil Procedure ("FRCP") over which the District Court had supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a). The Poole Complaint was then "related" to the Morgan Complaint and consolidated for case management purposes.

Pursuant to California law, Morgan demanded that the County and the Superior Court defend her and hold her harmless with respect to the Pooles' claims. The County and the Superior Court rejected Morgan's demand on the basis that Morgan was an independent contractor and, therefore, was not entitled to either a defense or to indemnification.

Morgan retained separate counsel and filed a FRCP 13(g) cross-claim seeking indemnity under California Government Code § 995 and California Labor Code § 2802. Morgan, *as a cross-claimant*, then moved for summary judgment seeking to have the District Court determine that she was an employee. At the same time, the County and Superior Court moved for summary judgment to have the Court determine that Morgan was an independent contractor with respect to Morgan's employee-based *plaintiff* claims as well as her cross-claim.

The District Court granted the County and Superior Court's motion holding Morgan to be an independent contractor and dismissed her cross-claim and her employee-based causes of action. Morgan was allowed to proceed to trial on her non-employee based claims *contained in the complaint that she had originally filed.* However, prior to trial, the District Court entered a separate judgment with respect to the Poole Complaint which judgment Morgan appealed to the Ninth Circuit.[3]

The only issue before the Ninth Circuit was whether Morgan had established the existence of a factual dispute regarding her employee status such that the District Court was precluded from finding, as a matter of law, that she was an independent contractor. Morgan's brief cited twenty-one (21) facts which could lead a fact-finder to conclude that the County and Superior Court had the right to control the means and manner by which Morgan performed her duties – the test for employee status under California law.[4]

Nonetheless, on December 4, 1998, the Ninth Circuit issued a 2 and 1/4 page decision affirming the grant of

---

[3] Morgan's substantive claims were ultimately tried to a jury in November 1997 and are now on appeal to the Ninth Circuit. On appeal, Morgan again raises the issue of whether the District Court correctly held that she was an independent contractor. Thus, the only individual who is potentially affected by the Ninth Circuit's unpublished decision is Morgan because Ninth Circuit Rule 36-3 allows citation of an unpublished decision where the doctrine of res judicata or collateral estoppel *may be* relevant.

[4] *Tieberg v. Unemployment Insurance Appeals Board*, 2 Cal. 3d 943, 950 (1970).

summary judgment. (App. 1-3.) The circuit panel designated its disposition as a Memorandum decision which, under Circuit Rule 36-3, can neither be published nor cited as precedent. The Ninth Circuit did not discuss, no less distinguish, the California cases cited by Morgan, and the panel's entire legal analysis is contained in the following three sentences:

> "The fact that Morgan did not receive standard employment benefits from the County indicates that she was not intended to receive the benefits of indemnification. Moreover, the intent of the County and Morgan was to create an independent contractor relationship. At the time of the underlying incident, Morgan and the County understood the relationship to be that of an independent contractor." (App. 2-3.)

Because neither the failure to pay appropriate employee benefits nor the parties' subjective belief is determinative under California law as to whether an employer retains the requisite "right to control",[5] Morgan petitioned the Ninth Circuit for rehearing. Alternatively, Morgan argued that the panel's designation of its disposition as an unpublished Memorandum decision constituted a denial of due process and equal protection and requested that the Court either publish the decision or

---

[5] *S. G. Borello & Sons v. Dept of Industrial Relations*, 48 Cal. 3d 341, 349 (1988) ("The labels placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced."); and *Toyota Motor Sales U.S.A., Inc. v. Superior Court*, 220 Cal. App. 3d 864, 877 (1990) ("These [failures to make tax withholdings from an individual's paycheck] are merely the legal consequences of an independent contractor status not a means of proving it.")

address the constitutionality of its non-publication rule and practice.

The Ninth Circuit denied the Petition for Rehearing and the Suggestion for Rehearing En Banc without comment. (App. 4.) Thereafter, pursuant to Circuit Rule 36-4, Morgan wrote a letter to the Clerk of Court requesting that the panel designate its Memorandum decision as a publishable Opinion on the grounds that the Memorandum decision qualified for publication under Circuit Rule 36-2 because (1) the decision altered or modified long-standing universal precedent and (2) concerned a legal and factual issue of substantial public importance. In addition to incorporating the arguments contained in her Petition for Rehearing, Morgan asserted that the failure to publish the Memorandum decision constituted an arbitrary and capricious application of the Circuit's Local Rule and therefore violated the due process and equal protection clauses of the Constitution. By letter dated February 10, 1999, the Clerk advised that the panel "did not wish to publish the decision". (App. 6.)

V.

REASONS FOR GRANTING THE WRIT

A. UNPUBLISHED, AND OFTENTIMES UNCITABLE, APPELLATE DECISIONS ARE NOW THE NORM, RATHER THAN THE EXCEPTION.

Until the early 1960s, almost all federal appellate decisions were published and constituted citable precedent. However, over the past 40 years, primarily as a result of a 1964 Judicial Conference suggestion, all of the courts of appeal have adopted local rules under which

decisions are designated as "not for publication". *See generally* Dragich, *Will The Federal Courts Of Appeal Perish If They Publish? Or Does The Declining Use Of Opinions To Explain And Justify Judicial Decisions Pose A Greater Threat,* 44 Am. U. L. Rev. 757, 760-762 (1995). What started out as non-controversial procedure, anticipated to be limited to cases of no legal significance, has grown like Topsy. The result is a growing body of "secret law" as this practice – commonly called "selective publication" – has come to dominate federal appellate decision making.

The most recent statistics are startling. As the following table shows, on average almost 75% of all federal appellate decisions are now designated as "not for publication" with the Seventh Circuit publishing the most decisions (slightly more than 50%) and the Fourth Circuit publishing the fewest (less than 10%).

U.S. Court of Appeals – Types of Opinions Or Orders Filed in Cases Terminated On The Merits During The Twelve Month Period Ended September 30, 1998[6]

Circuit	Total Cases	Published	Unpublished	Percent Unpublished
All	*24,828*	*6,247*	*18,581*	*74.6%*
D.C.	633	274	359	56.7%
First	740	370	370	50.0%
Second	1,721	514	1,207	70.1%
Third	1,740	254	1,486	85.4%
Fourth	2,569	242	2,327	90.6%
Fifth	3,552	1,030	2,522	71.0%
Sixth	1,861	399	1,462	78.6%
Seventh	1,415	716	699	49.4%
Eighth	1,856	778	1,078	58.1%
Ninth	4,337	710	3,627	83.6%
Tenth	1,576	436	1,140	72.3%
Eleventh	2,828	524	2,304	81.5%

The Ninth Circuit, as well as the First, Second, and Seventh Circuits, designate, by local rule, their non-published decisions as "non-precedential", and litigants are barred from citing these decisions.[7] The remaining circuits, although "disfavoring" citation of their non-published decisions, permit it; however, the Fifth, Eighth, Tenth, and Eleventh Circuits still classify such decisions

---

[6] This statistical data is excerpted from Table S-3 of the Judicial Business of the U.S. Courts, *Annual Report of the Director, 1998*. Excluded from this excerpt are the 82 oral decisions issued by the Sixth Circuit which Table S-3 includes as unpublished decisions.

[7] First Circuit Local Rule 36.1; Second Circuit Local Rule .23; and Seventh Circuit Local Rule 53.

as "non-precedential" while the Third, Fourth, and Sixth Circuits acknowledge, either explicitly or implicitly, the precedential worth of their unpublished decisions.[8]

B. SELECTIVE PUBLICATION HAS CREATED AN UNAUTHORIZED AND UNAPPROVED BODY OF SECRET LAW.

Selective publication has *never been authorized by Congress nor approved by this Court* although, as discussed *infra*, the related practice of vacatur was severely limited by this Court in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 115 S.Ct. 386 (1994). However, this growing body of "secret law" has not gone unnoticed by members of this Court. Justice Stevens, in dissenting from a summary disposition in *County of Los Angeles v. Kling*, 474 U.S. 936, 938, 106 S.Ct. 300, 301 (1985) described the practice of selective publication as "plainly wrong" stating:

> "As this Court's summary disposition today demonstrates, the Court of Appeals would have been well advised to discuss the record in greater depth. One reason it failed to do so is that the members of the panel decided that the issues presented by the case did not warrant discussion in a published opinion that could be 'cited to or by the courts of this circuit, save as provided by Rule 21(c).' [citation omitted] That decision not to publish the opinion or permit it

---

[8] Third Circuit Local Rule IOP 5.1-5.8; Fourth Circuit Local Rule 36(c); Fifth Circuit Local Rule 47.5; Sixth Circuit Local Rule 24; Eighth Circuit Local Rule 28A; Tenth Circuit Local Rule 36.3; and Eleventh Circuit Local Rule 36-2.

> to be cited – like the decision to promulgate a rule spawning a body of secret law – was plainly wrong."
>
> (footnote otmitted.)

Similarly, selective publication has received nearly unanimous condemnation from the academic community which has called for its repeal as flawed in concept and implementation. *E.g.*, Richman & Reynolds, *Elitism, Expediency, And The New Certiorari: Requiem For The Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996).

C. THE NINTH CIRCUIT VIOLATES THE CONSTITUTION IN CREATING, BY LOCAL RULE, A BODY OF SECRET, NON-CITABLE LAW.

Ninth Circuit Rule 36-1 provides that certain decisions will not be published while accompanying Circuit Rule 36-3 precludes use of these non-published decisions as precedent and bars their citation. This rule has led to a body of "secret law" applicable to the vast majority of litigants who are unfortunate enough to be consigned to the unpublished opinion category. Indeed, there is objective evidence that this body of "secret law" conflicts with published decisions issued by the circuit or is in conflict with other, unpublished decisions. *See* Carrington, et al., *Justice On Appeal*, p. 38 (1976) (discussing conflicts within Ninth Circuit that are only detectable with aid of unpublished decisions); and Gardner, *Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?*, 61 A.B.A.J. 1224 (1975).

The Ninth Circuit's rule, and the development of "secret law", is *in direct conflict* with a decision issued by

the Fourth Circuit. In *Jones v. Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972) the Fourth Circuit held that it could not bar citation of unpublished decisions, stating: "We concede, of course, that *any decision is by definition precedent*, and that *we cannot bar the right* to urge upon us what we have previously done." (emphasis added.)

Similarly, the Third and Sixth Circuits implicitly acknowledge the precedential value of their unpublished decisions by authorizing their citation where "counsel believes . . . that an unpublished decision has precedential value in relation to a material issue in a case . . . " (*E.g.*, Sixth Circuit Local Rule 24(c).) Thus, the Fourth Circuit, by decision, and the Third and Sixth Circuits, by rule, stand together *and in conflict with their sister circuits* in holding that unpublished decisions constitute *citable precedent*.

The Tenth Circuit's treatment of this issue is instructive on the perils of selective publication. In *Re Rules of the United States Court Of Appeals For the Tenth Circuit*, 955 F.2d 36 (10th Cir. 1992), the Tenth Circuit adopted, without comment, a non-precedent, non-citation rule over Chief Judge Holloway's dissent. Chief Judge Holloway, joined by Judges Barrett and Baldcock, rejected the proposition that a circuit court had the constitutional authority to designate decisions as non-precedential and bar their citation, stating.

> " . . . Each ruling, published or unpublished, involves the facts of a particular case and the application of law to the case. Therefore, all rulings of this court are precedents, like it or not, and we cannot consign any of them to

> oblivion by merely banning their citation. [citing *Jones v. Superintendent*] No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. *To deny a litigant this right may well have overtones of constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule."*
>
> (emphasis added and footnote deleted.) 955 F.2d at 37.

The Tenth Circuit has evidently conceded, at least in part, the correctness of Chief Judge Holloway's dissent because the circuit's *current* local rule allows the citation of non-published decisions where of "persuasive value" despite still considering such decisions to be "non-precedential" – a position shared by the Fifth, Eighth, and Eleventh Circuits. (Tenth Circuit Local Rule 36.3.)

A fundamental requirement of justice is that like cases be decided alike – this is the basic precept of the doctrine of *stare decisis*. As noted by Justice Douglas: "[T]here will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon. . . . *Stare decisis* serves to take the capricious element out of law and to give stability to a society." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949); and *see Glidden Co. v. Zdanok*, 370 U.S. 530, 543, 82 S.Ct. 1459, 1469 (1944). Consistency is the touchstone of fair and impartial decision making. *See generally* Dragich, *supra*, 44 Am. U. L. Rev. at 780.

The Ninth Circuit's Rule is a direct affront to *stare decisis*. The very fact that unpublished decisions cannot be cited guarantees that inequality will occur. Selective publication, by ensuring that the circuit will remain ignorant of its own past decisions, breeds inequality. *Id.* at 786-787. Inconsistencies necessarily arise because present panels have no knowledge of past panels' decisions. The treatment of Morgan's appeal is just the latest example of this unequal and inconsistent two-track system of appellate justice. If the Ninth Circuit allowed the *Morgan* decision to be cited as precedent, it could not hold, as it did, that Morgan was an independent contractor based on factors – the manner in which she was paid and her subjective belief – that the California courts have repeatedly held to be irrelevant or of secondary importance in determining employee status.

As all but the First, Second, Seventh, and Ninth Circuits recognize, judicial decisions have a "public component", and the courts of appeal simply do not possess the constitutional authority to hide their decisions through the expedient mechanism of selective publication. Indeed, the only difference between the appellate court practice of selective publication and the now *disapproved* and related practice of vacatur is that appellate judges rather than litigants make the decision as to what decisions constitute citable precedent.

In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, supra,* this Court severely limited the practice of vacatur whereby parties erase precedent by stipulated agreement. In *Bonner Mall,* this Court held that vacatur was only appropriate in "exceptional circumstances" and never simply because the parties were in agreement.

Quoting from Justice Stevens' dissent in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40, 114 S.Ct. 425, 428 (1993), this Court acknowledged the existence of a "public interest" in judicial decisions stating: "[Judicial precedents] are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by vacatur." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, supra,* 513 U.S. at 26, 115 S.Ct. at 392.

The creation of non-citable law – whether by litigants through vacatur or by judges through selective publication – ignores the public and constitutional interest in the creation of a coherent and consistent body of law. *See generally* Slavitt, *Selling The Integrity Of The System Of Precedent: Selective Publication, Depublication, And Vacatur,* 30 Harv. C.R.-C.L. Rev. 109 (1995). If the practice of vacatur is suspect, selective publication is equally suspect and demands review by this Court.

The Fourth Circuit stands alone in *expressly acknowledging* that it lacks the authority to create secret, non-citable, non-precedential law. Additionally, the Third, Fourth, and Sixth Circuits are in conflict with their sister circuits in treating all of their decisions as citable precedent. Accordingly, this Court should grant certiorari to resolve this inter-circuit conflict and to decide this critical issue which has had such an important and far-reaching effect on appellate litigants and the development of law in the United States.

D. THE NINTH CIRCUIT'S RULE ESTABLISHING CRITERIA FOR THE PUBLICATION OF DECISIONS PROVIDES NO EFFECTIVE OR MEANINGFUL RESTRAINT ON THE CIRCUIT'S DISCRETION, AND THEREFORE LEADS TO ARBITRARY AND CAPRICIOUS IMPLEMENTATION.

Assuming *arguendo* that the Ninth Circuit has the right to selectively publish decisions, the Circuit's rules are being applied in a capricious and arbitrary manner, and indeed, by their very nature, result in arbitrariness. Thus, this Court is compelled to consider the validity of the rules as drafted and applied.

Under Circuit Rule 36-2, the Ninth Circuit is obligated to publish any decision which meets its specified criteria. Yet, it is clear that the Ninth Circuit often ignores its own criteria and chooses to designate a decision as "not for publication" based on other, unspecified criteria.

The case of Petitioner Morgan presents a classic example. By holding that Morgan was an independent contractor based on the manner in which Morgan was paid and based on Morgan's subjective belief regarding her employee status, the Ninth Circuit was "establishing, altering, modifying, or clarifying" an existing rule of California law such that publication was mandated under Rule 36-2(a). As noted *supra* n. 5, the California courts have rejected these factors as dispositive evidence of employee status. Clearly, therefore, publication was required. The fact that the opinion issued provides little analysis is irrelevant. Nothing in Circuit Rule 36 authorizes the Circuit to reject publication based on the breadth of the analysis.

Alternatively, publication was mandated under Rule 36-2(d) because the decision involves a legal issue of substantial public interest. The distinction between "employee" status and "independent contractor" status is receiving considerable attention and judicial scrutiny in today's economy where more and more employers seek to classify individuals as independent contractors – a fact recognized by the Ninth Circuit in its own recent *en banc* decision on the subject, *Vizcaino v. Microsoft Corporation*, 120 F.3d 1007 (9th Cir. 1997), *cert. den.*, 118 S.Ct. 899 (1997).

Morgan's case is not an isolated example. The statistics alone are sufficient to demonstrate that the Ninth Circuit fails to follow its own specified publication criteria. It is impossible to believe that over 80% of the Ninth Circuit's decisions are based on the application of settled principles – especially where these unpublished decisions involve a significant number of cases where a district judge is reversed. *See* Dragich, *supra*, 44 Am. U. L. Rev. at 798-799.

One study demonstrated that *one in every seven* unpublished federal appellate decisions reversed the lower court. Reynolds & Reichman, *An Evaluation of Limited Publication in the United States Court of Appeals: The Price of Reform*, 48 Chi. L. Rev. 573, 617-618 n. 53 (1981). Another study showed that over 50% of Ninth Circuit reversals of Board of Immigration Appeal decisions were unpublished. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Court of Appeals*, 87 Mich. L. Rev. 940, 946-947 n. 33 (1989). It is inconceivable that district judges are so inept or inexperienced that they are failing

to apply settled legal principles in nearly 15% of their cases or that any appellate reversal would be of no legal significance. Indeed, some circuits, unlike the Ninth Circuit, explicitly recognize that "reversals" are legally significant and, therefore, normally require the publication of decisions in which a reversal occurs. (*E.g.*, Seventh Circuit Local Rule 53(c)(1)(v).)

Examples abound where a circuit's non-publication decision is nothing less than astonishing and clearly contrary to the circuit's specified publication criteria. For instance, in *Johnson v. Knable*, 1988 WL 119136 (4th Cir. 1988) the court held that if prison officials had denied a homosexual prisoner a job because of his sexual orientation, they may have violated the prisoner's equal protection rights. As the first case to hold that homosexuality might constitute a "suspect classification", *Johnson* was ground-breaking and, under the Fourth Circuit's criteria, should have qualified for publication. (Fourth Circuit Rule 36.4.)

This Court has even had occasion to note its astonishment at a circuit's nonpublication decision. In *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S.Ct. 2696 (1993) the Sixth Circuit, in an unpublished decision, held that a federal statute prohibiting the broadcasting of lottery advertisements was unconstitutional. In reversing, this Court observed: "We deem it remarkable and unusual that although the Court of Appeal affirmed a judgment that an Act of Congress was unconstitutional, as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion." 509 U.S. at 425 n. 3. *See also Board of Education v. Rowley*, 458 U.S. 176, 102

S.Ct. 3034 (1982) (reversing in an extensive opinion an uncitable decision of the Second Circuit).

Quite frankly, this Court's stated belief that such non-publication practices are "unusual" is unwarranted. In *National Classification Committee v. United States*, 765 F.2d 164 (D.C. Cir. 1985), Judge Wald wrote a "separate statement" to set forth her disagreement with the panel's prior non-publication order and criticized the practice of selective publication as "overused". Judge Wald noted that a committee impaneled to review the unpublished decisions issued by the D.C. Circuit had concluded that "40 percent of the decisions arguably *should have been published under the court's governing criteria.*" *Id.* at 173 (emphasis added).

The end result is that the courts of appeals have ceased to function in their historic role as "error correctors" and have transformed themselves into certiorari courts, or in the words of Dean Carrington, into "junior Supreme Courts." Richman & Reynolds, *supra*, 81 Cornell L. Rev. at 293. The circuit courts have accomplished this transformation by implementing rules which they themselves do not follow – as at least one D.C. Circuit judge has been forthright enough to admit. As a result, it is clearly impossible to predict what decisions will or will not be published because the publication rules are being applied in an arbitrary and capricious manner.

As implemented by the Ninth Circuit, selective publication is essentially a lawless exercise without any restraint on the circuit's discretion to designate a decision as "not for publication". The consequence is that the appeals of individuals, such as Morgan, receive little or

no real consideration because the circuit has the unfettered discretion to bury any decision in the trash heap of "not for publication". The solution for the federal appellate case load lies in structural change; not lawlessness. *See generally* Dragich, *Once A Century: Time For A Structural Overhaul Of The Federal Courts*, 1996 Wis. L. Rev. 11. Accordingly, it is incumbent on this Court to grant certiorari to ensure that the circuits act in a lawful manner in making such an important decision.

VI.

CONCLUSION

WHEREFORE, for the aforesaid reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

HENRY F. TELFEIAN
LAW OFFICE OF HENRY F. TELFEIAN
1247 Alvarado Road
Berkeley, CA 94705-1545
Tel: 510 848-0542

Attorney For Petitioner
Terry Morgan

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE P. POOLE; YOLANDA A. POOLE, Plaintiffs-Appellees, v. CARRIE TRITCHLER; KATHY WEHINGER, Defendants-Appellees, v. LAKE COUNTY; LAKE SUPERIOR COURT, Defendants-cross-defendants-Appellees, v. TERRY MORGAN, Defendant-cross-claimant-Appellant.	No. 97-16575 D.C. No. CV-95-05314-SI **MEMORANDUM**[1] (Filed Dec. 4, 1998)

Appeal from the United States District Court
for the Northern District of California

Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted October 8, 1998
San Francisco, California

---

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: HUG, Chief Judge, FLETCHER and TROTT, Circuit Judges.

Terry Morgan appeals the district court's grant of summary judgment in favor of County of Lake (County) and the district court's denial of her Motion for Leave to File a Motion for Reconsideration. We have jurisdiction pursuant to 28 U.S.C. § 1291. The parties are familiar with the factual and procedural history of the case, therefore, we will not recount it here.

I.

Morgan contends that the district court misconstrued the applicable substantive law in determining whether she was an employee for the purposes of indemnification under California Government Code section 995 (the Torts Claims Act) and the California Labor Code section 2802. We review a grant of summary judgment *de novo*, *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997), and we affirm.

Based upon the right to control test and the factors enumerated in the Second Restatement of Agency, we conclude that Morgan was not an employee because she retained the right to control the means and manner of accomplishing her assigned work. *S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal. 3d 341, 350, 769 P.2d 399, 404, 256 Cal. Rptr. 543, 548 (1989); *Tieberg v. Unemployment Ins. Appeals Bd.*, 2 Cal. 3d 943, 949, 471 P.2d 975, 979, 88 Cal. Rptr. 175, 179 (1970). The fact that Morgan did not receive standard employment benefits from the County indicates that she was not intended to receive the benefit of indemnification. Moreover, the intent of the

County and Morgan was to create an independent contractor relationship. At the time of the underlying incident, Morgan and the County understood the relationship to be that of an independent contractor. Accordingly, we find that the district court correctly applied the substantive law in concluding that Morgan was an independent contractor.

II.

Morgan also contends that the district court erred in denying her motion for Leave to File a Motion for Reconsideration on the basis that two internal County memoranda were not discoverable until the district court ruled, subsequent to the summary judgment hearing, that the documents were not subject to the raised privileges. We review the district court's denial of leave to file a motion for reconsideration for an abuse of discretion, *School Dist. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1261 (9th Cir. 1993), and we affirm. We agree with the district court that the documents contained no factual or legal basis that would likely change the outcome of the case. Accordingly, we find that the district court did not abuse its discretion in denying Morgan's Motion for Leave to File a Motion for Reconsideration.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEE P. POOLE; YOLANDA A. POOLE, Plaintiffs-Appellees, v. CARRIE TRITCHLER; KATHY WEHINGER, Defendants-Appellees, v. LAKE COUNTY; LAKE SUPERIOR COURT, Defendants-cross-defendants-Appellees, v. TERRY MORGAN, Defendant-cross-claimant-Appellant.	No. 97-16575 D.C. No. CV-95-05314-SI **ORDER** (Filed Jan. 13, 1999)

Before: HUG, Chief Judge, FLETCHER and TROTT, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a

vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

February 10, 1999

RE: Title: Poole v. Morgan
Appellate Number: 97-16575

Dear Counsel:

In response to your letter requesting publication of the memorandum decision in the above referenced case, the panel has asked me to advise you that they do not wish to publish the decision.

Very truly yours,

Cathy A. Catterson
Clerk of Court

By: /s/ Craig Westbrooke,
Craig Westbrooke
Deputy Clerk

cc: Brien J. Farrell
Nicolas L. Thakar
Michael D. Senneff
Marshall E. Bluestone
Steven C. Mitchell
Julie Collons Nelson
Nanette Joslyn
Henry F. Telfeian

Supreme Court, U.S.
FILED
MAY 7 1999
CLERK

No. 98-1622

In The

Supreme Court of the United States

TERRY MORGAN,

Petitioner,

v.

THE COUNTY OF LAKE, AND THE SUPERIOR COURT IN AND FOR THE COUNTY OF LAKE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL D. SENNEFF
(Counsel of Record)
MARSHALL E. BLUESTONE
SENNEFF KELLY, P.C.
50 Old Courthouse Square
Suite 401
P.O. Box 3729
Santa Rosa, California 95402
Telephone: (707) 526-4250
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15PP

TABLE OF CONTENTS

Page

JURISDICTION 1

STATEMENT OF THE CASE 1

A. Procedural Facts 2

B. Substantive Facts 2

REASONS FOR DENYING WRIT 3

A. There is no basis to argue that the unpublished status of the case affected the affirmation of the district court's order 3

B. The panel used the appropriate legal analysis and applied the correct state law to the undisputed evidence 4

1. As the substantive law of California was used to determine whether Morgan was an employee or independent contractor of the County, the panel's decision not to publish the memorandum did not create "secret law" for the State of California 4

2. The panel considered the facts presented by the parties and applied the "right to control test" and Second Restatement of agency law in its analysis 4

C. The Ninth Circuit Local Appellate Rules of Court do not violate the due process clause or equal protection clause of the United States Constitution 6

TABLE OF CONTENTS – Continued

Page

1. Due process was satisfied as Morgan had notice and an opportunity to be heard 6

2. Morgan was not denied equal protection of the laws as Rule 36 is rationally related to legitimate governmental interests..... 7

D. The panel's decision to not designate the memorandum for publication was not arbitrary and capricious 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974) 11

Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) 6, 7

Lyng v. Castillo, 477 U.S. 635 (1985) 8

Martinez v. California, 444 U.S. 277 (1980) 3

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) 9

S.B. Borello & Sons, Inc. v. Dept. of Indus. Relations, 48 Cal.3d 341, 769 P.2d 399, 256 Cal.Rptr. 543 (1989) 5, 11

Tieberg v. Unemployment Ins. Appeals Bd., 2 Cal.3d 943, 471 P.2d 975, 88 Cal.Rptr. 175 (1970) 11

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2071 6

OTHER AUTHORITIES

United States Court of Appeals for the Ninth Circuit's Local Rules of Appellate Procedure, Rule 36 ..... 6, 7, 8, 9, 10, 11

United States Court of Appeals for the Ninth Circuit's Local Rules of Appellate Procedure, Rule 47 6

JURISDICTION

Respondents County of Lake and the Superior Court in and for the County of Lake (collectively "County") do not contest this Court's jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition seeks to collaterally attack the Ninth Circuit's Opinion below by asserting that the United States Court of Appeals for the Ninth Circuit's Local Rules of Appellate Procedure and the application of those rules denied Petitioner Terry Morgan ("Morgan") due process of law and the equal protection of the law. The petition gives scant attention to the actual arguments of due process and equal protection, disregards the uncontested evidence which the Ninth Circuit Panel (the "Panel") reviewed in making its decision and ignores the flaws in its apparent zeal to criticize the Ninth Circuit.

As Morgan sets forth the procedural history of this case, the County will address the undisputed evidence upon which the Panel based its decision, with particular focus on the established facts demonstrating that Morgan had the right to control the means and manner of her work – the critical factor in the appeal. Before addressing Morgan's due process and equal protection arguments, the County will examine the flawed reasoning of Morgan's collateral attack on the Panel's Decision.

A. Procedural Facts

The petition sets forth an accurate account of the procedural history of this case. Morgan urges that there is a dispute on the facts that should have prevented summary judgment. Petition, p. 6. However, at the time of the District Court's decision, both Morgan and the County filed motions for summary judgment on the employee-independent contractor issue. Both motions were heard simultaneously and each party asserted that the underlying facts were not in dispute and that the decision could be made by the District Court applying the law to the undisputed facts. Petition, p. 5. On appeal, Morgan now claims that there were disputed facts. Petition, p. 6.

B. Substantive Facts

Morgan was employed as a *pro tem* court reporter for the County on 16 sporadic occasions over a three-month period. The *pro tem* reporters were called upon when the regular employee court reporters could not meet the court's needs. Through Morgan's deposition testimony, the County established that Morgan controlled the means and manner of her work as a *pro tem* court reporter. Morgan admitted that she had the right to refuse any offer of work from the County. According to Morgan, the only control the County had over her in regard to her *pro tem* work as a reporter was to tell her when she was needed and when transcript deadlines were approaching; she was responsible for every other aspect of her employment. This was the most significant evidence the County presented to support the motion for summary judgment.

The County presented additional evidence including the facts that Morgan never received employee benefits, she only received an Internal Revenue Service 1099 form marked non-employee at the end of the year, she used her own equipment on the job, she was paid on a *per diem* basis, and Morgan even applied for an employee position with the County during her *pro tem* work.

Based upon the facts presented to the Panel, a Memorandum was filed on December 4, 1998 affirming the District Court's decision.

REASONS FOR DENYING WRIT

A. There is no basis to argue that the unpublished status of the case affected the affirmation of the district court's order

The remedy requested of this Court is to order that the Memorandum be published. Whether or not the Memorandum is published, the Panel has made its decision on the merits, and Morgan's Petition for Rehearing and Suggestion for Hearing En Banc has already been denied. Even if this Court were to order that the Memorandum be published, the Panel's decision would still stand and Morgan would be in no better position. Morgan can appeal the Memorandum whether or not it is published. It would be pointless for this Court to answer the questions Morgan has presented regarding publication of the Memorandum as it would make no difference in the case. *Cf. Martinez v. California*, 444 U.S. 277, 284 (1980) (lack of causation made it unnecessary to decide whether state parole officers could potentially deprive

plaintiff's decedent of a constitutional right by releasing a prisoner on parole.) The petition should be denied on this basis alone.

B. The panel used the appropriate legal analysis and applied the correct state law to the undisputed evidence

1. As the substantive law of California was used to determine whether Morgan was an employee or independent contractor of the County, the panel's decision not to publish the memorandum did not create "secret law" for the State of California

Morgan urges that a body of secret law is being created by the Ninth Circuit when it decides not to publish a decision. Morgan fails to realize that the entire substantive part of the Memorandum was based upon California law, not federal law. There is no allegation that there is such secret law in California. If state law is used for the decision, and there is no claim that Morgan was unaware of the substantive law of the State of California, then Morgan is merely complaining that the Panel misapplied California law to the facts of her case, not that the Ninth Circuit is the repository of a body of secret law. As state law, not federal law, was exclusively used in ruling on the employee-independent contractor issue, there is no basis for this petition.

2. The panel considered the facts presented by the parties and applied the "right to control test" and Second Restatement of agency law in its analysis

The Panel advised the parties in the Memorandum that it was relying on the facts as known by the parties.

See Memorandum, Petition, Apx. A, App. 2[1] The Panel then set forth its decision:

> Based upon the right to control test, and the factors enumerated in the Second Restatement of Agency, we conclude that Morgan was not an employee because she retained the right to control the means and manner of work. *S.B. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal.3d 341, 350, 769 P.2d 399, 404 256 Cal.Rptr. 543, 548 (1989); *Tieberg v. Unemployment Ins. Appeals Bd.*, 2 Cal.3d 943, 949, 471 P.2d 975, 979, 88 Cal.Rptr. 175, 179 (1970).

Memorandum, Petition, Apx. A, App. 2.

Morgan fails to recognize this express statement in the Memorandum. Her suggestion that the Panel failed to use the "right to control test" is without support in the record.[2] The Panel clearly stated that it examined the record, used the "right to control test", and also examined the additional factors enumerated in the Second Restatement of Agency. Morgan's assertion that the Panel did not use the proper criteria is unsupported in the record she puts forth in the petition.

---

[1] As set forth above, Morgan's own admissions of her control over her work were contained within the record.

[2] The Panel also referred to the other factors under the Second Restatement of Agency. *See* Memorandum, Petition, Apx. A, App. 2. The Panel did specifically discuss two *additional* factors; Morgan did not receive employment benefits and both parties intended Morgan to be an independent contractor. The Second Restatement of Agency is cited within *S.B. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal.3d 341, 350, 769 P.2d 399, 404 256 Cal.Rptr. 543, 548 (1989).

C. The Ninth Circuit Local Appellate Rules of Court do not violate the due process clause or equal protection clause of the United States Constitution

1. Due process was satisfied as Morgan had notice and an opportunity to be heard

The Court should first examine whether Morgan is entitled to due process under the Fifth Amendment of the United States Constitution at all based upon her claim that the Memorandum should have been published. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260-261 (1987). In this case, Morgan was not entitled to due process.

Morgan claims she was entitled to have the Memorandum published. There is no such requirement, and no authority is identified anywhere in the petition that mandates that it be published. By enacting 28 U.S.C. § 2071, Congress authorized the Courts of Appeal to adopt local rules of practice. The Ninth Circuit, pursuant to § 2071 and the Federal Rules of Appellate Procedure, Rule 47, adopted such local rules, including the United States Court of Appeals for the Ninth Circuit's Local Rules of Appellate Procedure, Rule 36 ("Rule 36"). There is no argument that the court exceeded its powers in adopting local rules. There is no authority for the proposition that Morgan is entitled to have her case published under any statute, rule of law or constitutional provision. This Court does not publish the rationale for denying every Petition for a Writ of Certiorari that is presented. There is no law or constitutional provision requiring this Court to publish its rationale just as no law binds the Ninth Circuit to publish every decision.

The fact of whether a case is published does not deprive Morgan of any property right. She can still

appeal the case if she feels that the Memorandum is incorrect under the law. As Morgan has failed to specify the property right of which she was deprived when the Memorandum was not published, she is not entitled to due process of law.

Assuming *arguendo* that Morgan had a property right that evoked due process of law, she was given notice and an opportunity to be heard on appeal. Whether or not the case was published would not affect Morgan's right to appeal the decision and, therefore, Morgan cannot claim a due process violation. The " 'fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." ' [citations omitted.]" *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 261 (1987).

It is undisputed that Morgan was given the opportunity to brief her appeal and present the complete record from the District Court, file a reply and given the opportunity to present oral argument to the Panel. Morgan was given notice and an opportunity to be heard. That is all that is required to satisfy due process considerations in this case. The Due Process clause does not require notice, an opportunity to be heard *and* the right to publication.

2. Morgan was not denied equal protection of the laws as Rule 36 is rationally related to legitimate governmental interests

Morgan claims that Rule 36[3] violates the equal protection clause of the Fifth Amendment of the United States Constitution by classifying Ninth Circuit decisions

---

[3] *See* Petition, pp. 2-3.

as either appropriate for publication or not appropriate. As Petitioner does not claim, nor could she, that this case involves any "suspect" or "quasi-suspect" classifications, this Court has held that such a "classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. [citations omitted]." *Lyng v. Castillo*, 477 U.S. 635, 639 (1985).

Rule 36 itself sets forth several rational bases for its enactment. Rule 36-2(a)-(g) sets forth the criteria or reasons why a decision should be published. Each reason stated is related to a legitimate governmental interest. For example, one of the governmental interests in publishing a decision is to make available the ruling as precedent when it "(a) Establishes, alters, modifies or clarifies a rule of law." Rule 36-2(a). Decisions which do not meet this requirement are not to be published because they do not meet the rational governmental purpose of establishing new case law precedent.

Another example is found in Rule 36-2(b) which allows a ruling to be published if to do so "calls attention to a rule of law which appears to have been generally overlooked." There is a governmental interest in creating a body of precedent in an area of law which may not yet have a diversity of cases or may not be fully developed. Conversely, areas of the law which have a sufficient number of precedents do not require publication.

Each of the other criteria for publication have similar rational reasons for the creation of a classification of published and unpublished decisions. Morgan has simply

ignored the "rational relationship test." Rule 36-2 explicitly states the reasons for publication of a case and each is rationally related to a legitimate governmental interest.

The petition sets forth another rational reason for the classification of published and non-published cases. The petition states that the Ninth Circuit is by far the busiest circuit handling more cases than any other circuit. According to the petition, the Ninth Circuit publishes only 16.4%[4] of the appeals which it reviews. Petition, p. 10. Out of the 4,337 cases reviewed, only 710 were published leaving 3,627 unpublished decisions. *Id.* The affect of publishing another 3,600 rulings a year would create a heavy burden on court, law libraries and practitioners without a corresponding benefit. As set forth above, Rule 36-2 sets the criteria for publication of decisions: the 3,600 unpublished decisions did not meet this criteria. By increasing the shear volume of published rulings fivefold,

---

[4] Morgan cannot claim that the disproportional impact on unpublished decisions is, in and of itself, a violation of equal protection. Even when a suspect classification is involved, this Court has required that there be evidence of purposeful discrimination. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979) [analyzed a plaintiff's equal protection claim which challenged a veteran's preference policy favoring men at a rate of 98%.] Notwithstanding the disproportionate impact, this Court found that there was no violation as plaintiff could not show that the classification was adopted to purposefully discriminate against women. *Feeney, supra*, 442 U.S. at 278-79. It is not enough to prove the policy maker could have foreseen the discriminatory effect of a policy. This element requires that the particular policy be adopted "at least in part 'because of', not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279.

unnecessary time, money and resources would have to be applied without a significant benefit in light of the publication criteria of Rule 36-2.

Furthermore, the court's, public agencies' and private practitioners' resources, time and energy will be wasted in the time it takes to separate controlling authority from non-controlling authority. Logically, five times the effort will be devoted to sifting through text to separate the "wheat from the chaff." The Panel, in deciding a particular case and reviewing the relevant case law, is in the best position to determine whether the case before it is of such significance to justify its inclusion in the body of law that will be reviewed when the next case arises. If the case adds nothing to the existing body of law, then to publish the case will tax and waste public resources. The ramifications of a requirement of publication would be overwhelming on the legal community. In light of the burden of a requirement of publication and the rational reasons set forth in Rule 36-2 for the publication of cases, Rule 36 does not violate the equal protection clause.

D. The panel's decision to not designate the memorandum for publication was not arbitrary and capricious

Rule 36-2 expressly sets forth criteria for publication. This is not a case of an arbitrary system but instead the Ninth Circuit has articulated a set of standards in Rule 36-2. This is not Morgan's complaint. Instead, she argues that the Memorandum fits within the framework of Rule 36-2. The scope of review of such an inquiry is a narrow

one. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

First, Morgan fails to inform the Court that there was no dispute among the parties that the "right to control test" was the most important factor for the court to consider. Both parties cited for authority the cases set forth in the Memorandum: *S.B. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal.3d 341, 350, 769 P.2d 399, 404 256 Cal.Rptr. 543, 548 (1989); *Tieberg v. Unemployment Ins. Appeals Bd.*, 2 Cal.3d 943, 949, 471 P.2d 975, 979, 88 Cal.Rptr. 175, 179 (1970). These cases are 10 and 29 years old and are the controlling authority in the State of California as they set forth the "right to control test." Second, Morgan's case adds nothing to the established law of California and she fails to distinguish the facts of her case as unique. Morgan does not even attempt to fit her case within the criteria of Rule 36-2 except to say that the Panel failed to utilize the "right to control test" and, therefore, the Memorandum affects current California Law. Petition, p. 17. As stated above, the assertion that the Panel applied the incorrect test is not supported by the text of the Memorandum.

Morgan also claims that the Memorandum is of important public interest and should have been published. Petition, p. 18. The discussion of the case is direct and to the point and does not offer exhaustive analysis, which is not warranted in this case, where the facts and law are clear (and undisputed at the cross-motions for summary judgment before the District Court). Morgan fails to set forth a reason why this case is so unique as to qualify for publication. There is no basis for claiming that the Panel's decision to not publish the Memorandum was

arbitrary or capricious. The Panel had a rational basis for not publishing the Memorandum as it adds nothing to the existing state of the law and the facts are not so unusual as to be of significance.

CONCLUSION

Ultimately, Morgan's argument is reduced to a claim that the Panel applied the wrong law to the facts of this case. Morgan will not benefit from publication of this case nor will publication of the case affect the substantive law of the State of California. Morgan's due process and equal protection claims are without support in the record before this Court. Finally, there is no basis for finding that the Panel acted arbitrarily or capriciously in deciding not to publish the Memorandum. For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

MICHAEL D. SENNEFF
(*Counsel of Record*)
MARSHALL E. BLUESTONE
SENNEFF KELLY, P.C.
50 Old Courthouse Square, #401
P.O. Box 3729
Santa Rosa, California 95402
Telephone: (707) 526-4250

Attorneys for Respondents